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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Petitioner,
v.
ALLAN BAKKE, *Respondent.*

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

BRIEF OF AMICI CURIAE

FOR The National Urban League; the National Organization for Women (NOW); the United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW); the National Conference of Black Lawyers; the La Raza National Lawyers Association; the Mexican American Legal Defense and Educational Fund; the Puerto Rican Legal Defense and Educational Fund; California Rural Legal Assistance, Inc.; the National Bar Association, UCLA Black Alumni Association, the National Federation of Women's Organizations; UC Davis Law School, Chicano Alumni Association; the Charles Houston Bar Association; the National Lawyers Guild; La Raza National Law Students Association; Black American Law Student Association

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California Assembly, Spec. Subcomm. on Bilingual-Bicultural Education, "Toward Meaningful and Equal Educational Opportunity: Report of Hearings on Bilingual-Bicultural Education (July, 1976) 26
Educational Testing Service, Law School Validity Study Service, 21 (1973) 26
Feitz, "The MCAT and Success in Medical School", Sess. # 9.03, Div. of Educ. Meas. and Research, AAMC (mimeo) 25
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INTEREST OF AMICI CURIAE [1]

The National Urban League, Inc., is a charitable and educational organization organized as a not-for-profit corporation under the laws of the State of New York. For more than 65 years, the League and its predecessors have addressed themselves to the problems of disadvantaged minorities in the United States by improving the working conditions of blacks and other minorities, by fostering better race relations and increased understanding among all persons, and by implementing programs approved by the League's interracial board of trustees.

The NOW Legal Defense and Educational Fund is the litigation and education affiliate of the National Organization for Women. NOW is a national membership organization of women and men organized to bring women into full and equal participation in every aspect of American society. The organization has a membership of approximately 30,000 with over five hundred chapters throughout the United States. Many of its members are university women, faculty and students.

The UAW is the largest industrial union in the world, representing approximately a million and a half workers and their families. Including wives and children, UAW represents more than 4½ million persons throughout the United States and Canada. The UAW, which is deeply committed to equal opportunity

[1] Letters of consent from counsel for the petitioners and the respondents have been filed with the Clerk of the Court.

and anti-discrimination, does much more than bargain for its members. It is by mandate of its Constitution and tradition deeply involved in the larger issues of the quality of life and the improvement of democratic institutions. The question presented by this case vitally affects the UAW and its members.

The National Conference of Black Lawyers, through its national office, local chapters, cooperating attorneys and the law student organization, has (1) carried on a program of litigation, including defense of affirmative suits on community issues; (2) monitored governmental activity that affects the black community, including judicial appointments, and the work of the legislative, executive, judicial and administrative branches of government; and (3) served the black bar through lawyer referral, job placement, continuing legal education programs, defense of advocates facing judicial and bar sanctions, and watchdog activity on law school admissions and curriculum.

La Raza National Lawyers Association is a nationwide group of attorneys of Mexican-American heritage. The Association is committed to working for the movement toward equality of Mexican Americans in American society. To achieve this end, the Association is committed to increase the admission of Mexican-Americans to law schools and the legal profession in order that the legal needs of Mexican-Americans can be represented to the fullest in the courts of our nation.

The National Lawyers Guild is an organization founded in 1937 with over 5,000 members. It works to maintain and protect civil rights and civil liberties.

U.C. Davis Law School, Chicano Alumni Association is a group of Chicano graduates of the Martin Luther King, Jr. School of Law at U.C. Davis. The Association's goals are twofold: (1) To operate as a forum for communication for Chicano law graduates in order that they can work for the social betterment of the Chicano people; and, (2) to maintain communication with Chicano law students at the Davis Law School in order to assist the students in the areas of admission, retention and graduation.

The U.C.L.A. Black Alumni Association is composed of graduates of the U.C.L.A. special admissions program who are interested in the continuing vitality of the special admissions programs as one vehicle of assuring representation of minorities in the University's graduate schools. In conjunction with the University, this Association has a continuing interest in maintaining such programs.

The Mexican American Legal Defense and Educational Fund is a privately funded civil rights law firm dedicated to insuring that the civil rights of Mexican Americans are properly protected; a major thrust of their effort has been in the area of education, including higher education, for which they have established a Task Force of prominent Mexican Americans to advise them. They filed an amicus brief in the instant case when it was pending in the California Supreme Court.

The Puerto Rican Legal Defense and Educational Fund is a privately funded civil rights law firm dedicated to insuring that the civil rights of persons of Puerto Rican ancestry are fully protected. They have been greatly involved in education litigation on behalf of Puerto Rican students.

National Bar Association, Inc., was formally organized in 1925. It consists of jurists, lawyers, legal scholars and students whose purpose and programs have sought to combat the effects of racial discrimination and to advance the realization of the goal of first class citizenship for all Americans. The membership of the Association has successfully advanced the interests of minority citizens in the areas of housing, employment, education, voting, and protection of the rights of criminal defendants.

La Raza National Law Students Association is a nationwide group of Chicano and Latino law students organized for the following purposes: 1) to recruit Chicanos and Latinos to attend law schools; 2) to assist in the retention of Chicano and Latino law students once they are admitted to law school; and 3) to promote the provision of legal services to Chicano and Latino communities throughout the nation.

Charles Houston Bar Association is an association principally comprised of Black attorneys in Northern California. It is an affiliate of the National Bar Association, a nationwide association of Black attorneys and students. Charles Houston Bar Association has been actively involved in promoting and protecting the civil rights of all minorities. It includes among its members, judges, attorneys and law professors, and has a close relationship with minority student associations.

California Rural Legal Assistance, Inc., is an organization funded under the Legal Services Corporation Act to provide legal assistance to low-income individuals. A high proportion of its clients are members of racial minority groups, and a good deal of its

efforts have been directed toward combatting the effects of racial discrimination against these clients in many segments of American society.

BALSA was founded in 1968 in NY and has 7,000 Black law students among its membership. Its purpose is to articulate and promote goals of Black American law students, encourage professional competence and instill in the Black attorney and law student a greater awareness of and commitment to the needs of the Black community.

I.

INTRODUCTION

Whether the Constitution will permit the use of affirmative efforts by institutions of higher education to overcome historical discrimination and segregation of racial minorities is an issue of vital importance, both to amici, and to the American society at large. The Court's resolution of the issue presented in this case may determine the future course of integration efforts not only in the medical profession, but in other professions and the educational avenues leading to them. Such a decision will have a dramatic and long-term impact on civil rights and race relations for future decades in this country. The resolution of this issue may in many ways approach in importance the landmark decision, *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

Although desirous that this important issue be finally resolved, amici strongly urge that a decision not be rendered in the case at bar. It is essential that this issue may be resolved in a case where a spirited conflict between the parties has resulted in a fully developed

record upon which to base such an important decision. The crux of amici's position is that instead petitioners have attempted to "stipulate" to this Court's jurisdiction in order that they can seek an advisory opinion on this critical issue in a case with a sparse record and without the presence of a case or controversy as mandated by Article III of the United States Constitution. An issue of this magnitude simply cannot be resolved in a case which severely lacks "that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions". *Flast* v. *Cohen*, 392 U.S. 83, 99 (1968).

II.

AS A RESULT OF BAKKE'S LACK OF STANDING TO SUE, NO CASE OR CONTROVERSY EXISTS HEREIN AS REQUIRED BY ARTICLE III

A. The Requirements of Article III.

In a formulation of the rule directly applicable to the facts of this case, this Court in *Flast* v. *Cohen*, *supra*, at 99 stated the requirement of standing as a constitutional prerequisite to federal jurisdiction:

> The fundamental aspect of standing focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.[2]

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[2] As Mr. Justice Frankfurter stated:

> One must oneself be made a victim of a law (*Lehon* v. *City of Atlanta*, 242 U.S. 53 (1916)) or belong to the class 'for whose sake the constitutional protection is given' (*Hatch* v. *Reardon*, 204 U.S. 152, 160 (1907)) to be able to invoke the Constitution before the Court. Frankfurter, *A Note on Advisory Opinions*, 37 Harv. L. Rev. 1002, 1006, N. 12 (1924).

Last term this Court reiterated this rule as follows:

> . . . The standing question in its Art. III aspect "is whether the plaintiff has 'alleged such personal stake in the outcome of the controversy' as to warrant *his* invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth* v. *Seldin*, 422 U.S. 490, 498-499 (1975) (emphasis in original). In sum, when a plaintiff's standing is brought into issue the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation. *Simon* v. *Eastern Kentucky W.R.O.*, —— U.S. ——, ——, 96 S.Ct. 1917, ——, (1976). *Accord Sierra Club* v. *Morton*, 405 U.S. 727, 734-35 (1972); *United States* v. *Richardson*, 418 U.S. 166, 174 (1974).[3]

This causation requirement is not met by the facts of this case. This Court's jurisdiction can only be exercised if it is shown, first, that Bakke suffered a "specific harm" to himself as "the consequence" of the Task Force program at U.S. Medical School, *Warth* v. *Seldin*, *supra*, at 505 (1975). No such showing has or could be made. To the contrary, as strongly supported by the evidence in the record and as specifically stated in the trial court's findings, "plaintiff would not have been accepted for admission to the class entering the Davis Medical School . . . [in 1973 and 1974] even

[3] Just this week, the Court once again reaffirmed the *Warth-Simon* principle that an "actionable causal relationship" must be demonstrated between the challenged conduct and the asserted injury. *Arlington Heights* v. *Metropolitan Housing Corp.*, —— U.S. ——, (January 11, 1977) (Slip. Opp. at B538-B542).

if there had been no special admissions program." (Pet. for Cert., App. F. p. 116a.)

B. The Facts of This Case Do Not Comport with the Article III Requirement.

Mr. Bakke applied to the Davis Medical School in 1973 and 1974. In each of these years, he was not selected for any of the 84 regular admission positions available.[4] It is his contention that he would have been admitted had the 16 Task Force positions been opened and available to regular applicants. In short, this proposition is premised on the belief that his application was among the top 16 regular applicants not admitted. The evidence in the record reveals Bakke's premise to be totally without foundation.

1. *The application process.*

In order to understand why it is relatively easy to make such an assertion, it is necessary to realize that all applicants were given a "Benchmark score" which was the primary tool for comparing candidates. This Benchmark score was a composite of many factors including scores on the MCAT examination, grade point average, and evaluations flowing from various interviews. Testimony indicates that with only minor exceptions, not relevant to Bakke, an applicant with a higher Benchmark score was admitted over one in the same batch with a lower score (CT.[5] 63-64). This was true, only with respect to those applications which

[4] In 1973, there were in fact 85 regular admission positions and 15 Task Force positions. This recently discovered fact was not reflected in the trial court record. See n. —, *infra*.

[5] "CT" References are to the Clerk's Transcript filed in the California Supreme Court.

were considered within the same period of time because it was the practice to evaluate the applications in "batches" (CT. 63-64). In the first month in which acceptances were made, applications then on file would be evaluated in order to send out early offers.

After a sampling of acceptances were received, which would indicate an acceptance rate adequate to fill the number of spaces still available, all of the previously received applications which were competitive but had not prompted offers would be compared with recently received applications and a second round of offers would go forth to fill the remaining slots. The applications thus on file in January would be evaluated against each other. The applicants with the highest Benchmark scores receive offers. The applications on file during successive rounds would likewise be evaluated and offers would go to those with the highest Benchmark scores. Thus, the two determinative factors in the decision-making process were the Benchmark score that the applicant was given and the time when the application was considered. At the conclusion of this process, the remaining students, who were numerically close to admission, were placed on an alternate list. Inclusion on the alternates list was not based on strict numerical rankings. The Dean of Admission had discretion to admit persons who would bring special skills. It should be noted that the Dean in neither year exercised his discretion to place Bakke on the alternate list (CT. 64). This then is the basic framework from which the Dean of Admission in uncontroverted testimony and the trial court, on the basis of such testimony, was able to determine that Mr. Bakke would not have been admitted even in the absence of the Task Force program.

2. *The Bakke applications.*

Bakke's 1973 application, his first, was not received until "quite late", and was thus prejudiced by the fact that a substantial number of the positions had already been filled (CT. 64). Earlier applicants, regular as well as Task Force, had been accepted for admission prior to consideration of Bakke's application (CT. 54, 181). Thus, his application was competing for an otherwise more limited number of remaining positions against a larger number of competitors. Mr. Bakke's 1973 Benchmark score was 468. As the Dean of Admission stated, "[i]n filling the 100 spaces in the class no applicants with ratings below 470 were admitted after Mr. Bakke's evaluation was completed". (CT. 69).

Assuming that none of the Task Force admittees had been able to meet the regular admission standards and that all 16 positions were available, the Dean of Admissions has unequivocally stated that Bakke would nevertheless have been denied admission:

> "Indeed, Plaintiff would not even have been among the 16 who would have been selected assuming that *all* of the places reserved under the special admissions program had been open following Plaintiffs' evaluation. Almost every applicant offered a place in the class after the middle of May attends the medical school. There were 15 applicants at 469 ahead of Mr. Bakke and he would not have been among the top applicants at 468 because he was not a 468 put on the alternates list as he had no special qualifications or new information upgrading his score."
>
> (CT. 70).

Indeed there were twenty students in 1973 who like Bakke had 468, some of whom were placed on the al-

ternates list due to special qualifications (CT. 70). It thus is certain that at least 16 persons had priority over Mr. Bakke in 1973 and, thus, as the trial court found, the demise of the Task Force program would not have resulted in his admission.

The evidence is even stronger regarding Bakke's 1974 application. His 1974 Benchmark score was 549 out of 600. The record shows that there were a total of 20 applicants on the alternates list who would have been selected for any additional positions. Once again, Bakke was not on the alternates list in 1974. Furthermore, there were an additional 12 applicants, not on the alternates list, with numerical ratings above Bakke's 549 (CT. 71). Thus, there were at least 32 applicants who were ahead of Bakke for the 16 possible positions. As the Dean of Admission stated, in 1974 Bakke did not even "come close to admission" (CT. 71).[6]

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[6] An additional factor which would have operated against Bakke's application is the definite possibility that some of the Task Force admittees would have been able to gain admission under the regular admissions process. While there are no numerical ratings of Task Force admittees available, the record does disclose that the overall grade point average of such admittees ranged up to 3.76 in 1973) (CT. 175, 210). In 1974, Task Force admittees had overall grade point averages ranging up to 3.45 and science grade point averages ranging up to 3.89 (CT. 178, 223). Bakke's scores were 3.51 and 3.45 respectively. (CT. 115). Thus, in both 1973 and 1974, there were Task Force applicants whose grades equalled and surpassed that of Bakke and who could have met certain of the nonracial special consideration factors making their applications more attractive. Finally, it should be noted that in 1973, Bakke was denied admission at 10 other Medical Schools to which he applied (Bowman-Gray, University of South Dakota, University of Cincinnati, Wayne State University, Georgetown University, Mayo, U.C.L.A., San Francisco, Stanford and his undergraduate alma mater, University of Minnesota) (CT. 48-49).

In conclusion, the uncontroverted evidence strongly supports the finding of the trial court that the Task Force program had no effect on Bakke's application in that he would have been denied admission regardless of the program's existence.

As in *Warth,* where the facts failed to show that the restrictive zoning practices resulted in plaintiffs' exclusion, here the record is equaliy devoid of *any* facts showing that the Task Force program resulted in Bakke's exclusion from the Davis Medical School. No showing is possible that "but for" the Task Force program, Bakke would have been admitted. In short, no "casual relationship" exists on these facts. *Warth, supra,* 422 U.S. at 407.

Bakke is simply not within the class of persons affected by the policy he seeks to challenge. The parties seek a "gratuitous" decision of complex and vitally important issues in this case "inconsistent with the Article III limitation". *Simon, supra,* —— U.S. ——, 96 S.Ct. 1917.

C. The "Stipulation" By the University is an Effort to Fabricate Jurisdiction in This Court.

Under the standards of Article III, as has been previously shown, Bakke does not have sufficient standing to prosecute this litigation in the federal courts. The University, in its rush to obtain a judgment from this Court, recognized this fatal flaw after the California Supreme Court filed its opinion. At the time of its Petition for Rehearing in the California Supreme Court, the University sought to correct it. What it did, in essence, was to "stipulate" to this Court's jurisdiction in order to obtain the advisory opinion they seek. Such a "stipulation" was a pure fabrication of the

facts, contrary to the University's insistent position up to that date, and contrary to the trial court's findings;[7] further it is ineffectual under this Court's consistent rulings that parties cannot stipulate to jurisdiction *Swift & Co.* v. *Hocking Valley Ry. Co.*, 243 U.S. 282, 289 (1917).

The California Supreme Court in its September 16th Order remanded to the trial court the issue of whether Bakke would have been admitted to the Davis Medical School in the absence of the Task Force pro-

[7] The Petitioners make reference to an aside by the trial court in its initial Notice of Intended Decision that there was "at least a possibility that [Bakke] might have been admitted" absent the Task Force program. (Pet. for Cert. at 11, n. 4) The Court then went on to find specifically to the contrary. (*Id.*, at 116a). Subsequently, after further briefing and argument, the trial court spoke with even greater finality in its Addendum to Notice of Intended Decision:

> The Court has again reviewed the evidence on this issue and finds that even if 16 positions had not been reserved for minority students in each of the two years in question, plaintiff still would not have been admitted in either year. Had the evidence shown that plaintiff would have been admitted if the 16 positions had not been reserved, the court would have ordered him admitted. (*Id.*, at 111a).

And the court after discussing the record in detail concluded subsequently in its Findings of Fact and Conclusions of Law that:

> Plaintiff would not have been accepted for admission to the 1973 class even if there had been no special admissions program; • • • Plaintiff would not have been accepted for admission to the class entering Davis Medical School in 1974 even if there had been no special admission program (*Id.*, at 116a-117a).

Dr. Lowery's Memo to H.E.W., referred to at n.4 of the Petition for Certiorari, merely bemoans the fact that a "lack of available space" exists in the Medical School and had "additional places" existed, Bakke may have been admitted. This in no way contradicts the trial court's findings that given the existing space limitations, Mr. Bakke would not have been admitted even if the 16 slots had become available.

gram, shifting the burden to the University to establish that Bakke would not have been so admitted. The court did not intimate in any way, however, that the uncontroverted and substantial evidence presented by the University at the trial level was insufficient; it merely stated that this evidence must be evaluated in light of the different burden (18 Cal. 3d at 64).[8]

The University subsequently attached a "stipulation" to its Petition for Rehearing, which purported to concede that the University could not meet this burden.[7] The Petition, relying upon this "stipulation" urged the court to remand to the trial court to order Bakke admitted to the Medical School. The California Supreme Court on the basis of the stipulation so ordered.

The logical question flowing from the stipulations is why the University contrary to its insistence that Mr. Bakke would not have been admitted even in the absence of the task force program essentially reversed its position at such a late date. (See pp. —, *supra.*)

The answer to this question is that the University realized that the record, in the absence of the stipulation, clearly showed a lack of jurisdiction in this Court to decide an issue that it clearly wished addressed: as the University said in urging the Court to order Bakke admitted:

> It is far more important for the University to obtain the most authoritative decision possible on

[8] An analogue to the present case would be a woman not pregnant seeking to invalidate an abortion law in federal court and, although conclusive evidence showed her not to be pregnant, the state (being desirous of an advisory opinion) "stipulating" that it was unable to prove that fact in order to simulate a case or controversy.

the legality of its admissions process than to argue over whether Mr. Bakke would or would not have been admitted in the absence of the special admissions program. A remand to the trial court for determination of that factual issue might delay and *perhaps prevent review* of the constitutional issue by the United States Supreme Court. Petition for Rehearing, 11-12 (emphasis added).[9]

Admission of Mr. Bakke to the Medical School certainly would not have "prevented review" by this Court. By asking for this relief in the stipulation, it is clear that it was not admission that the University feared. Rather, it was ultimate success on remand to the trial court with regard to Bakke's admissibility which the University wished to avoid. It was precisely their success which would have made apparent Bakke's lack of Article III standing and thereby "prevent" the review that the University so eagerly seeks. In other words, the University essentially gave up an air tight case in order to confer "jurisdiction" on this Court so that it could achieve its goal of obtaining "the most authoritative decision possible". (*Ibid.*)[10]

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[9] No problem arose until the University sought an opinion from this Court, for in California the same standing strictures are not applicable. However, as Justice Rehnquist, writing for the majority in *Richardson* v. *Ramirez*, 418 U.S. 24, 36 (1974), observed: "While the Supreme Court of California may choose to adjudicate a controversy simply because of its public importance, and the desirability of a statewide decision, we are limited by the case-or-controversy requirements of Article III to adjudication of actual disputes between adverse parties".

[10] Indeed there are indications predating the filing of this action that the University's primary aim was to "set the stage" for a judicial determination of the validity of its Task Force program.

In the summer of 1973, following his first denial, Mr. Bakke entered into an exchange of correspondence with the Admissions

However resourceful this attempt, a common thread in this Court's past and recent decisions has been the view that the Court is not empowered to

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Office of the Davis Medical School. In the first of three letters, between Bakke and Assistant to the Dean of Admissions, Peter C. Storandt, Storandt expressed sympathy for Bakke's position. Further, he urged that Bakke "review carefully" the Washington Supreme Court's opinion in *DeFunis*, sent him a summary of the opinion, urged that he contact two professors known to be knowledgeable in medical jurisprudence (CT. 264-65), recommended that he contact an attorney and concluded with the "hope that . . . you will consider your next actions soon" (CT. 265).

Two weeks later, Bakke met with Storandt at the Davis Medical School (CT. 268); and 5 days later Bakke wrote to Storandt as follows:

> Thank you for taking time to meet with me last Friday afternoon. Our discussion was very helpful to me in considering possible courses of action. I appreciate your professional interest in the question of the moral and legal propriety of quotas and preferential admissions policies; even more impressive to me was your real concern about the effect of admission policies on each individual applicant.
>
> You already know, from our meeting and previous correspondence, that my first concern is to be allowed to study medicine, and that challenging the concept of racial quotas is secondary. Although medical school admission is important to me personally, clarification and resolution of the quota issue is unquestionably a more significant goal because of its direct impact on all applicants. (CT. 268; App. A)

Bakke's letter then went on to outline his alternative litigation strategies (CT. 268-69) consisting of "Plan A" and "Plan B". Storandt promptly replied. After remarking that, "the eventual result of your next actions will be of significance to many present and future medical school applicants" (CT. 266), he went on to suggest the use of "Plan B" over "Plan A":

> I am unclear about the basis for a suit under your Plan A. Without the thrust of a current application for admission at Stanford, I wonder on what basis you could develop a case as plaintiff; if successful, what would the practical result of your suit amount to? With this reservation in mind, in addition to my sympathy with the financial exigencies you cite, I prefer your Plan B, with the proviso that you press the suit—even if admitted—at the institution of your choice. And

decide important social issues merely because a party wishes a decision. *Lord* v. *Veazie,* 49 U.S. (8 How.), 251, 255 (1850); *Muskrat* v. *United States,* 219 U.S. 346 (1911), *United States* v. *Richardson,* 418 U.S. 166 (1974) (misuse of funds by the Central Intelligence Agency); *Schlesinger* v. *Reservists to Stop the War,* 418 U.S. 208 (1974) (violation of incompatability clause of Article I, § 6 cl. 2 of the Constitution); *Warth* v. *Seldin,* 422 U.S. 490 (1974) (constitutionality of restrictive zoning ordinances); while the last three cases cited highlighted burning issues that great numbers of persons had and have an interest in, that fact alone, without more, was deemed insufficient to invoke this Court's jurisdiction.

This is not the first time that a party has attempted by stipulation to circumvent this Court's evaluation of the true facts. However, as Justice Frankfurter explained:

> Even where the parties to the litigation have stipulated as to the 'facts' this Court will disregard the stipulation—if the stipulation obviously forecloses real questions of law. *United States* v. *Felin & Co.,* 334 U.S. 624, 640 (1948).

The rationale for looking behind a stipulation of fact that fails to correspond to real facts was further explicated by Justice Frankfurter:

> if this Court had to treat as the starting point for the determination of constitutional issues a spurious finding of 'fact' contradicted by an adjudicated finding between the very parties to the instant controversy, constitutional adjudication would become a verbal game. *Id.,* at 639.

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there Stanford appears to have a challengeable pronouncement. If you are simultaneously admitted at Davis under EDR [Early Decision Program], you would have the security of starting here in twelve more months (CT. 266).

In sum, it is just a "verbal game" which the University is playing with this stipulation. Thet facts and the University's own assertions up to the date of the stipulation belie its validity. The University's effort to confer jurisdiction on this court should properly be rejected.

III.

BECAUSE THE ISSUE ON THE MERITS IS SO IMPORTANT TO THE ENTIRE NATION, THIS CASE SHOULD NOT BE DISPOSED OF ON THE MERITS ON THE BASIS OF SUCH A SKETCHY RECORD

A. A Fully Developed Record Is Essential to a Reasoned and Principled Judgment in This Case.

The record in this case is so deficient that this Court should decline to reach the merits. A decision on the merits should not be made on such an important issue on such a poor record. Rather, the Court should vacate the decision below and remand for the taking of further evidence. *DeFunis* v. *Odegaard,* 416 U.S. 312, 320 (1974); *Morales* v. *State of New York,* 396 U.S. 102, 104-06 (1969) (Order vacating and remanding for taking of further evidence because of the "absence of a record that squarely and necessarily presents the issue and fully illuminates the factual context in which the question arises. . . ." *id.,* at 106.

Concededly, the substantive issue raised by the parties is vitally important. The numerosity of amici and their participation at such an early stage in this Court attest to that. A decision on the merits could also have substantial bearing on employment practices.

See, e.g., Executive Order 11246, 30 Fed. Reg. 12319 (Sept. 24, 1965), as amended; *Associated Gen'l Contractors of Mass., Inc.* v. *Altshuler*, 490 F.2d 9, cert. den., 416 U.S. 957 (1st Cir. 1973).

Petitioners are not engaging in hyperbole when they characterize the issue as "perhaps the most important equal protection issue of the decade". (Pet. for Cert., 12.) It is even more than that because of what it may portent for the decades ahead, for both minorities and the majority of our nation.

We do not propose that this case is not worthy of certiorari because it lacks significance, but rather, precisely because the issue is so very significant both the needs and interests of all affected persons as well as sound jurisprudential principles militate that the Court closely examine the record to best insure that this is *the* case to decide *this* issue. As Dean Pollack has said, "[t]he more important the issues, the more strictly the Court must monitor the exercise of its awesome discretion". *DeFunis Est Non Disputandum*, 75 COLUM. L. REV. 495, 509 (1975).

This Court's power rests, not on the militia that it can command, for it commands none. Rather, it rests upon the soundness of its reasoning and the shared belief of those who do and those who do not prevail that reasoning is well-grounded in a fully developed case. In the words of the late Professor Alexander Bickel, the "well-tempered case", is the one which best insures public and professional acceptance of this Court's awesome role of final constitutional arbiter. *The Least Dangerous Branch; The Supreme Court at the Bar of Politics*, Bobbs-Merrill, 1962 169-82; *see also*, id., at 124, 197-98. The substantive issue in the

instant case is the paradigm of the prudent wisdom embodied in the need for the "well-tempered case".

Frequently, this Court has declined to grant certiorari because a record was not "sufficiently clear and specific to permit decision of the important constitutional questions involved. . ." *Massachusetts* v. *Painten*, 389 U.S. 560, 561 (1968). The Court declines its Writ where a record is "too opaque", *Wainwright* v. *City of New Orleans*, 392 U.S. 598 (1967) (concurring opinion of Harlan, J.) or because "the facts necessary for evaluation of the dispositive constitutional issues in [the] case are not adequately presented by the record", *id.*, at 599 (concurring opinion of Fortas and Marshall, JJ.). *Accord, Naim* v. *Naim*, 350 U.S. 891 (1956); *Newsom* v. *Smyth*, 365 U.S. 604, 604-05 (1961); *Smith* v. *Mississippi*, 373 U.S. 238 (1963).

The Court has broadly explained that the basis for its rules of caution:

> lie in all that goes to make up the unique place and character, in our scheme, of judicial review of governmental action for constitutionality. They are found in the delicacy of that function, *particularly in view of possible consequences for* others also stemming from constitutional roots [and] the comparative finality of those consequences . . . *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 571 (1947) (emphasis added).

In the instant case, the "others" are the disadvantaged minorities who risk jeopardy of their rights on an inadequate record, minorities who have not participated in the litigation. The University, at best, bears only a limited risk because the intense competition for places in the Medical School will insure that qualified

minority applicants will be replaced by other qualified applicants.

We are not unmindful of the "very real disadvantages, for the assurance of rights, which deferring decision very often entails." *Id.*, at 571. Lest there be any doubt, we do not urge the Court to avoid the merits in this case for the purpose of delay or deferral. Many other similar cases are now on their way to this Court. Rather, because of the extreme importance of the substantive issues, we urge that the Court choose the "fully developed case" for disposition because:

> a contrary policy, of accelerated decision, might do equal or greater harm to the security of private rights. . . . For premature and relatively abstract decision, which such a policy would be most likely to promote, have their part too in rendering rights uncertain and insecure. *Id.*, at 572."
>
> The applicability of these rules: can be determined only by an exercise of judgment relative to the particular presentation, though relative also to the policy generally, and to the degree in which the specific factors rendering it applicable are exemplified in the particular case. It is largely a question of enough or not enough, the sort of thing precisionists abhor but constitutional adjudication nevertheless constantly requires. *Id.*, at 574 (emphasis added) *Accord, Poe* v. *Ullman*, 367 U.S. 497, 508-09 (1961). The following examination of the record demonstrates that, given the importance of this case, there is just "not enough."

[11] The rush to judgment in the instant case encompassed both the parties: the case was tried on a paper record tantamount to summary judgment, 18 Cal. 3d at 39; and the California Supreme Court exercised its rarely used power to transfer a cause to it, "prior to a decision by the Court of Appeal, because of the importance of the issues involved". *Id.*

B. The Record.

1. *The Evidence presented by the University.*

The only affirmative proof presented by the University in its defense and in support of its request for a declaratory judgment was one eleven-page declaration by the Chairman of the Admissions Committee, Dr. Lowry (CT. 61-72). Apart from discussion of Mr. Bakke's personal situation, the declaration merely makes a series of conclusionary statements. No other evidence was presented since the University stipulated that the case could be decided on the basis of this declaration and the paper evidence generated by Mr. Bakke.

2. *The Evidence not presented by the University.*[12]

The California Supreme Court's decision turned directly upon: (1) its perceived rule of law that: "[a]bsent a finding of past discrimination—and thus the need for remedial measures to compensate for . . . prior discriminatory practices . . ., the preferential treatment of minorities . . . is invalid on the ground that it deprives a member of the majority of a benefit because of his race", 18 Cal. 3d at 57-58.

[12] The following discussion relates only to some of the University's most glaring evidentiary omissions. Not only is the record barren of facts, but recent discoveries point to at least one rather important misstatement of fact. The record states that in 1974, there were sixteen Task Force Admittees, while recent revelations indicate that in fact there were fifteen. This error is neither harmless nor insignificant since it appears that the sixteenth "slot" was returned to regular admissions for the Task Force felt that there was need for a more qualified admittee. Letter of Dr. S. Gray, App. B, *infra*.) This substantially undercuts the finding of the Court below that the program is "a form of an educational quota system" (18 Cal. 3d at 62) reflecting a "rigid proportionality" (*id.* n. 33).

and, (2) the absence of not only such a finding, but indeed, "no evidence in the record to indicate that the University has discriminated against minority applicants in the past". *Id.*, at 59. Based on a record silent on this crucial point, the California Supreme Court concluded that it "must *presume* that the University has not engaged in past discriminatory conduct". *Id.*, at 60 (emphasis added). Thus, upon this thin reed of presumption, the Task Force program was held invalid. In short, the Court's decision "depends upon unalleged and unknown facts". *Simon* v. *Eastern Kentucky WRO, supra,* 96 S.Ct. at 1927, n. 25.

While we take strong exception to this holding of the California Supreme Court, see, *e.g., Associated Gen. Contractors of Mass.* v. *Altshuler,* 490 F.2d 9 (1st Cir. 1973), *cert. denied,* 416 U.S. 957 (1974); *Contractors Assn. of Eastern Penn.* v. *Secretary of Labor,* 442 F.2d 159 (3rd Cir. 1971), *cert. denied,* 404 U.S. 845 (1971); *cf., Kahn* v. *Shevin,* 416 U.S. 351 (1974), the only prudent position by a university set upon presenting all possible defenses would have been to offer evidence of past discrimination, given the long line of cases supporting affirmative action programs flowing from such a finding.

One obvious evidentiary discrepancy in this record relates to the Medical School Admissions Test (MCAT). The lack of evidence on this point is striking in light of the guidance given by Justice Douglas on this very point in his dissent in *De Funis* v. *Odegaard,* 416 U.S. 312, 327-37 (1974). While the view of one Justice of this Court is not controlling sound trial strategy would warrant that the tactic should be attempted. It was not just a passing thought of Justice Douglas. Nearly all of his 28-page dissent is devoted

to the issue and it concludes with the belief that the matter should be remanded for the taking of evidence on the point. Thus, the point here is not whether or not the MCAT will ultimately be found the be racially biased, but the fact that the record is silent on this important issue.

In dictum, the court below dismissed pleas by amici to follow the course of action urged by Justice Douglas in *De Funis.* The court believed that in spite of the racially disproportionate impact of the MCAT, its use is not unconstitutional, relying on *Washington* v. *Davis,* —— U.S. ——, 96 S.Ct. 2040 (1976). The latter case is inapposite. *Washington* cannot be read to say that a university is barred from compensating for an uncontroverted degree of bias in a test instrument which it, because of circumstances, is forced to rely upon in part. Yet, if the record had been fully developed, such fact could have been shown. Since the University receives federal funds, it is subject to Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (CT. 24, 278) and its implementing regulations, 45 C.F.R. § 80; discriminatory effect, irrespective of discriminatory purpose, would impose an obligation on the University to demonstrate, the validity of the MCAT. *Lau* v. *Nichols,* 414 U.S. 563, 568 (1974).[13]

[13] A recent study on the relationship between the MCAT and success in medical school by the Association of American Medical Colleges has found that Blacks who had successfully completed the first two years of medical school had lower MCAT averages than whites who had flunked out. Robert H. Feitz, *The MCAT and Success in Medical School,* Sess. #9.03, Div. of Education Measurement and Research, AAMC (mimeo). *See also,* Simon, et al., *Performance of Medical Students Admitted Via Regular And Admissions—Variance Routes,* 50 J. MED. ED. 237 (Mar. 1975). Thus, there is evidence available to prove that the MCAT

In addition to the absence of evidence of discrimination against minority applicants on the part of the Medical School itself, the record is devoid of evidence to prove that the State of California, through its educational system, has discriminated against minority students in numerous ways that have deprived them of an equal opportunity to gain admission to medical school. *See, e.g., Jackson* v. *Pasadena City School District*, 59 Cal. 2d 876 (1963) (segregation) *Lau* v. *Nichols*, 414 U.S. 563 (1974) (language), California Assembly, Special Subcomm. On Bilingual-Bicultural Education, "Toward Meaningful And Equal Educational Opportunity: Report of Hearings on Bilingual-Bicultural Education" (July, 1976). Closely related is the absence of any evidence relating to the omnipresent influence of racial discrimination that mars this Nation's history.

Another serious defect in the record relates to the "compelling state interest" test and its "less onerous

measures Blacks as "less qualified" than some whites, when they are in fact "better qualified".

This evidence, never before the trial court or California Supreme Court, puts into serious doubt the very question at issue before it: whether the Special Admissions Program at U.C. Davis Medical School "offends the constitutional rights of *better qualified applicants* denied admission . . . ." 18 Cal. 3d at 38, (emphasis added).

In addition, there is substantial reason to doubt the predictive value of the MCAT as applied to all applicants. "The highest correlation recorded for MCAT scores with medical school grades at Harvard was 0.22, and an average correlation of 0.15 [at other schools] supports the conclusion that the MCAT is unable to discriminate meaningfully among . . . pre-medical students". Whittico, *The President's Column: The Medical School Dilemma*, 61 J. Nat'l Med. A 174, 185 (March, 1969). Similarly, correlations of combined LSAT (Law School Admissions Test) and undergraduate grade point averages, among ninety-nine law schools studied, runs from 0.2 to 0.7, with the median being 0.43. Educational Testing Service, *Law School Validity Study Service*, 21 (1973).

See also, Griswold, *Some Observations On the DeFunis Case*, 75 COLUM. L. REV. 512, 514-15 (1975).

alternative" counterweight. The University has harsh criticism for the California Supreme Court's " 'clearly fanciful speculation' " regarding the efficacy of its self-hypothesized alternatives (Pet., 19, 16-17). The criticism is deserved but more deserved is criticism of the total absence of any evidence on these critically determinative points. For example, the University sought, in part, to establish as a compelling state interest the greater rapport that, minority doctors would have with minority patients and the fact that an increase in the number of minority doctors may help to meet the crisis now existing in a minority community seriously lacking adequate medical case. 18 Cal. 3rd at 53. But, "the record contains no evidence to justify" this proposition. *Id.* Of course, it is easier for a court to dismiss an assertion which is unsupported by the "flesh" of an evidentiary basis.

Another example of the paucity of the record is the fact that "the only evidence in the present record on" the unavailability of alternative means "is the admission committee chairman's statement that, 'in the judgment of the faculty of the Davis Medical School, *the special admissions program is the only method* whereby the school can produce a diverse student body . . .' " 18 Cal. 3rd at 89 (Tobriner, J., dissenting) (emphasis in original). This was an issue deserving extensive evidentiary development.

CONCLUSION

The importance of the substantive issues in this case extends far beyond the parties because of the role of the basic policy at issue in overcoming the historical consequences of exclusion. The interests of the "majority" are inextricably bound to, and congruent with, the interests of the "minorities" because of this nation's ineluctable movement to racial harmony and peace. This Court's long-standing commitment to further this

development would be ill-served by addressing the merits in light of the crucial Article III defect and a record so wanting in the necessary elements for the exercise of this Court's plenary power.

Respectfully submitted,

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BLACK AMERICAN
LAW STUDENT ASSOCIATION

APPENDIX

APPENDIX A

July 18, 1973

Mr. Allan P. Bakke
1083 Lily Avenue
Sunnyvale, California 94086

Dear Allan:

Thank you for your thoughtful letter of July 1. I must apologize for not answering your original communication of May 30 sooner, it arrived amidst the preparations for our second commencement, the start of the summer quarter for continuing students, and a complicated array of management changes within the medical school's administration.

Your first letter involves us both in a situation that is perhaps as painful for us as for you. You did indeed fare well with our Admissions Committee and were rated in its deliberations among the top ten percent of our 2,500 applicants in the 1972-73 season. We can admit but one hundred students, however, and thus are faced with the distressing task of turning aside the applications of some remarkably able and well-qualified individuals, including, this year, yourself. We do select a small group of alternative candidates and name individuals from that group to positions in the class made vacant by withdrawals, if any. The regulations of the University of California do not permit us to enroll students in the medical school on any other basis than full-time, however, so that even your suggestions for adjacent enrollment cannot be enacted.

Your dilemma—our dilemma, really—seems in your mind to center on your present age and the possible detrimental influence this factor may have in our consideration of your application. I can only say that older applicants have successfully entered and worked in our curriculum and that your very considerable talents can and will override any questions of age in our final determinations.

I think the real issue is what to do now. I have two suggestions, one related to your own candidacy here, the other addressed to the matters raised in your second letter. First, I would like you to apply a second time to Davis, under the Early Decision Plan. We are participating in the AMCAS system this year and to apply as an EDP candidate you need only so indicate on the appropriate AMCAS form and agree to apply only to Davis until a decision is reached, no later than October first. The advantages are early and thorough evaluation and interview with a correspondingly prompt decision either to offer you a place or to defer your application for later consideration as a regular applicant. In the event that our decision is the latter, you might consider taking my other suggestion which is then to pursue your research into admissions policies based on quota-oriented minority recruiting. The reason that I suggest this coordination of activities is that if our decision is to deter your application for admission, you may then ask AMCAS to send it elsewhere as well. Your interest in admission thus would become more generalized and your investigation more pointed.

I am enclosing a page that describes the basic approach used by the medical school at Davis in evaluating applicants who have "minority"status. I don't know whether you would consider our procedure to have the overtones of a quota or not, certainly its design has been to avoid any such designation, but the fact remains that most applicants to such a program are members of ethnic minority groups. It might be of interest to you to review carefully the current suit against the University of Washington School of Law by a man who is now a second year student there but who was originally rejected and brought suit on the very grounds you outlined in your letter. While the case is on appeal to the U.S. Supreme Court at this time, the immediate practical result two years ago was a lower court-

ordered admission for the plaintiff. The case, De Funis vs. Odegaard, can be researched in a law library at your convenience: a summary is enclosed. I might further urge that you correspond with Prof. Robert Joling, a member of the faculty at the University of Arizona College of Medicine interested in medical jurisprudence. An attorney, Joling can give you perhaps the best indication of the current legal thinking on these matters as they pertain to medical schools. Associate Dean Martin S. Begun of the New York University School of Medicine can also assist in your research.

I hope that these thoughts will be helpful, and that you will consider your next actions soon. I am enclosing an application request card for your use, should you decide to make a second shot at Davis.

Sincerely,

Peter C. Storandt
Assistant to the Dean
Student Affairs/Admissions

Sunnyvale, California 94086
1088 Lily Avenue
August 7, 1973

Peter C. Storandt
Office of Student Affairs
University of California, Davis
Davis, California 95616

Dear Mr. Storandt:

Thank you for taking time to meet with me last Friday afternoon. Our discussion was very helpful to me in considering possible courses of action. I appreciate your professional interest in the question of the moral and legal propriety of quotas and preferential admissions policies; even more impressive to me was your real concern about the effect of admission policies on each individual applicant.

You already know, from our meeting and previous correspondence, that my first concern is to be allowed to study medicine, and that challenging the concept of racial quotas is secondary. Although medical school admission is important to me personally, clarification and resolution of the quota issue is unquestionably a more significant goal because of its direct impact on all applicants.

The plan of action I select should be designed to accomplish two purposes—to secure admission for me and to help answer the legal questions about admissions practices which show racial preference.

Two action sequences which appear to have some prospect of satisfying both requirements are outlined below.

Plan A

1. Apply to Davis under the Early Decision Program.

2. If admitted, I would retain standing to sue Stanford and UCSF in order to officially pose the legal questions involved. With my admission assured, I could proceed directly to a filing of pleadings, bypassing the possible compromise of admitting me to avoid the inconveniences of legal proceedings. Hopefully, I would be able to obtain legal or financial assistance to sustain these proceedings.

Plan B

1. Apply to Davis under the Early Decision Program.
2. Confront Stanford in August or September, 1973, attempting to secure immediate admission as an alternative to a legal challenge of their admitted racial quota.
3. If admitted to Stanford, then sue Davis and UCSF. If also admitted to Davis, sue only UCSF.

Stanford is chosen for this confrontation because of their greater apparent vulnerability. Stanford states categorically that they have set aside 12 places in their entering class for racial minorities.

Two principles I wish to satisfy in choosing my course are these:

1. Do nothing to jeopardize my chances for admission to Davis under the E.D.P.
2. Avoid actions which you, Mr. Storandt, personally or professionally oppose. My reason for this is that you have been so responsive, concerned, and helpful to me.

Plan B has one potential advantage over plan A. It contains the possibility, probably remote, of my entering medical school this fall, saving a full year over any other ad-

missions possibilities. Because my veterans' educational benefits eligibility expires in September, 1976, admission this year would also be a great financial help.

Mr. Storandt, do you have any comments on these possible actions? Are there any different procedures you would suggest? Would Davis prefer not to be involved in any legal action I might undertake, or would such involvement be welcomed as a means of clarifying the legal questions involved?

Although they may not be relevant to the legality of preferential minority admissions, I would like to learn the answers to several questions. They relate to how well those selected under "minority" admissions programs perform.

1. Do they require special tutoring?
2. Do they take longer to complete medical school and therefore use more resources?
3. Do they perform adequately on national evaluation examinations?

Are statistics like these available as public records, and if so, where can one obtain them?

If it is more convenient to phone than to write, should you have any comments or answers for me, you may reach me any day after 4:30 P.M. at my home (408) 246-3356. I will be happy to accept charges for any such call.

Again, thank you for the considerable time and effort you have spent listening to my inquiries, informing, and advising me. If you are in the Sunnyvale area and would like to visit us, Judy and I would be happy to have you.

Sincerely yours,

/s/ Allan P. Bakke
Allan P. Bakke

August 15, 1973

Mr. Allan P. Bakke
1088 Lily Avenue
Sunnyvale, California 94086

Dear Allan:

Thank you for your good letter. It seems to me that you have carefully arranged your thinking about this matter and that the eventual result of your next actions will be of significance to many present and future medical school applicants.

I am unclear about the basis for a suit under your Plan A. Without the thrust of a current application for admission at Stanford, I wonder on what basis you could develop a case as plaintiff; if successful, what would the practical result of your suit amount to? With this reservation in mind, in addition to my sympathy with the financial exigencies you cite, I prefer your Plan B, with the proviso that you press the suit—even if admitted—at the institution of your choice. And there Stanford appears to have a challengeable pronouncement. If you are simultaneously admitted at Davis under EDP, you would have the security of starting here in twelve more months.

Your questions about the actual academic performance of those admitted under "minority" admissions programs have been asked frequently, as you might imagine, and have received attention in many circles, I would suggest researching these issues in the *Journal of Medical Education*, where an extensive bibliography has accumulated in the last few years. At Davis, such students have not required "official" tutoring, although they and many of their classmates have organized an impressive series of study sessions during the year. A few of them—perhaps ten percent—have taken longer than four years to complete the M.D. degree (but not more than one year longer). Their performance on the first part of the National Board of Med-

ical Examiners' test series has been mixed—half of the current third year class "minority" students failed to qualify as passing the first time they took the examination; all of our "minority" students have passed the appropriate levels of the test by the time of their graduation. Part two, based on the clinical years of a medical education, seems to pose no such problems for these students.

I am sure that you can recognize the need for careful evaluation of these facts and opinions. I will be interested to learn of your view of them, particularly after you have been able to read some studies done on a national and regional basis. Is there a medical library reasonably close to you that you could use in working up your research on this subject?

With best wishes,

Sincerely,

PETER C. STORANDT
Assistant to the Dean
Student Affairs/Admissions

APPENDIX B

UNIVERSITY OF CALIFORNIA, DAVIS

DIVISION OF THE SCIENCES
BASIC TO MEDICINE
DEPARTMENT OF HUMAN PHYSIOLOGY

SCHOOL OF MEDICINE
DAVIS, CALIFORNIA 95616

January 4, 1977

Editor
The Sacramento Bee
21st and Q Streets
Sacramento, CA 95813

Dear Sir:

The article entitled, "U.C. Davis Suit Has National Impact", by N.Y. Times News Service writer Gene I. Maeroff (Sacramento Bee, Jan. 2, 1977) contains a number of inaccuracies and misconceptions which have repeatedly appeared in news accounts of the special admissions program at UCD Medical School, as well as in the public record of the Bakke case. One of the most flagrant misstatements of fact which has recurred is that UCD has had a strict quota of 16% of the places reserved for minority students out of the 100 available in each freshman class. The special admissions program as it was originally authorized by the medical school faculty in 1970, set 16% as a goal toward which the admissions committee was to work in admitting disadvantaged students. The difference between a goal and a quota may seem to be a minor academic point to the public, but it most assuredly is not an insignificant one. It is actually one of the crucial points on which the judicial decision in the Bakke case was based. Not only was it the intent of the faculty that 16% be a goal, but in practice the admissions committee has viewed it as a goal, since two of the freshmen classes, one of which was the class for which

Bakke sought admission, enrolled only 15 students by way of the special program.

Another misconception is that the program was specifically set up in order to admit racial minorities. In the 1970 faculty authorization for the program, no mention was made of ethnic or racial identity as being a factor in the selection process for special admittees. It was specifically stated that highly motivated and promising students with backgrounds of educational deprivation were to be considered under a new program which was to be called, Task Force on Medical Education for Underprivileged Citizens, and it was implied that the sociol-economic factors which were primarily responsible for the educational deprivation were to be looked at carefully in selecting the students. Although most of the students who subsequently enrolled via the program have been from racial minorities, white students have not been arbitrarily excluded from the program, as has been implied repeatedly. On the contrary, quite a few of them have been interviewed for special admission. The national AMCAS application form which is used by UC Davis as well as a majority of the U.S. medical schools (the student files one form and has copies of it sent to all of the medical schools to which he would like to apply), asks the applicant whether he wishes consideration for admission under a minority program. Schools which have no such program ignore the answer to that question, others use the data in their selection process to suit their own programs. The question is worded in that way because many schools actually do have programs which are set up specifically to recruit minorities. It is ironic that UC Davis was singled out as having a racial quota system, when in actuality it is one of the few schools which set up its program on a non-racial, non-quota basis. In spite of the wording of the question regarding minority consideration on the application form, many white students do ask for special consideration in the minority category. At Davis

an admissions subcommittee screens all applicants who ask for special consideration (both whites and racial minorities) and gives strongest consideration to those who appear, from other personal data in the application, to be disadvantaged. The medical school bulletin which is available to all applicants, states specifically that religious preference, sex and race of the applicant are not considered in the evaluation process, and it describes the special program as being one based on socio-economic/educational disadvantage. Although grades, test scores and disadvantage factors are used in the initial screening of these applicants, the students who are finally selected for admission are chosen because they present the strongest evidence of a serious desire to eventually return to a disadvantaged area similar to that from which they came (mainly inner city ghetto, rural area, or Indian reservation) to provide health care, since those are the geographical areas in which medical needs are not being served adequately by the medical profession. With those criteria, it is not surprising that most of the students who have entered the program have come from racial minorities, since those are the ones who predominantly inhabit California's disadvantaged areas, and they are the ones who have a paramount interest in the living conditions there. The program can be viewed somewhat as a 'bootstrap operation' in which those directly involved are given the opportunity to better their own health conditions.

The final point which needs clarification is that medical school admission is never decided strictly on the basis of grades and aptitude test scores. Bakke has charged 'reverse discrimination' because minority students with lower academic averages than his were preferentially admitted by way of a special program. However, Davis, as well as most other medical schools, accepts students through the regular admission process who have B+ averages, in preference to some A students, because they appear to have

superior personal qualities. Thus, grades have been the sole concern of admissions committees in selecting students (otherwise a computer could be used to select the class), and Bakke is not necessarily more qualified for the study of medicine (or the eventual practice of medicine) merely because he has higher undergraduate grades than some other students. Maeroff quotes President Bok of Harvard University on the dangers of having court judges impose rigid admissions criteria for schools, since they don't have 'first-hand experience with the nuances and subtleties of the admissions process'. It is precisely those nuances and subtleties which are the important human factors to be considered in selecting future physicians. It would be disadvantageous to have them rigidly standardized by a court because admissions committees need some judgmental latitude in selecting a balanced class of students with varied personalities, backgrounds, career goals and interests. Hopefully, continuation of such admissions policies will allow for the education of physicians who are attuned to the health needs of all levels of society.

Respectfully,

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